IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75—626

WILLIAM H. NOLAN, on behalf of himself and all others similarly situated,

*Petitioner,*

*v.*

RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER, THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N. SOTTILE, as Administrators and Trustees of the Profit Sharing Plan for the Employees of Merrill Lynch, Pierce, Fenner & Smith, Incorporated,

*Respondents.*

## PETITIONER'S REPLY MEMORANDUM

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November 26, 1975

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## PETITIONER'S REPLY MEMORANDUM

This memorandum is respectfully submitted in reply to arguments raised in Respondents' opposing Brief.

I. Respondents have failed to address any response to the issue of whether federally-qualified profit-sharing plans constitute substantial or insubstantial subject matter. Instead, Respondents have endeavored to restate the pivotal issue of Petitioner's claim to jurisdiction as one based upon an inference of substantive rights derived from federal statutes. Respondents have avoided any reference to the holding of the Second Circuit in *Ivy Broadcasting Co., Inc.*

v. *American Telephone & Telegraph, et al,*[1] where jurisdiction was established of a common law claim notwithstanding that a federal statute did not confer a substantive right of action. In *Ivy Broadcasting Co., supra,* it was expressly held that such a right need not be inferred from the statute, but that the issue of whether federal common law would be applied to establish jurisdiction was based upon the federal substantiality of the subject matter. In 391 F.2d at p. 489, it was stated:

> "• • • the Act does not expressly grant a remedy for negligence or breach of contract in the rendition of communications service. Nor do we think that such a remedy should be 'inferred' from the Act; there is no reason to believe that Congress, in the Communications Act, intended to declare the existence of the fundamental right to recover for tort or breach of contract. Therefore, 47 U.S.C. § 207 does not confer jurisdiction on the district court.
>
> "The question remains whether plaintiff's claims are governed by federal common law and, if so, whether the district court has jurisdiction under 28 U.S.C. § 1331."

*Ivy Broadcasting Co., supra,* rejected the contention, made by Respondents, that a federal common law claim is required to be implied from a statute. It is well-established that federal common law is a separate body of federal substantive law, separate of statutes, and where invoked, provides original jurisdiction.[2] Not one case cited in Respondents' Brief founded jurisdiction on principles of federal common law.

The conflict in the Second Circuit between the decision in *Ivy Broadcasting Co., supra,* and its decision herein,

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[1] 391 F.2d 486 (C.A., 2d Circ., 1968).

[2] *State of Texas* v. *Pankey,* 441 F.2d 236 (C.A., 10th Circ., 1971)



justifies the granting of certiorari to review the judgment below.

II. Respondents' opposing Brief (Page 9) asserts that New York has already passed upon the reasonableness of the forfeiture provision of this Plan.[3] The contrary is true. The case cited by Respondents follows an "employee-choice" rule holding these benefits are employers' *gifts,* and therefore, reasonableness of restraint placed upon the employee is not to be considered *at all.* Federal decisional law long ago established that employee plan benefits of this nature are indeed additional compensation to employees.[4]

Respondents' reliance on the gift theory in anomalous state decisions is unsupportable federally. It is apparent that Congress did not intend these benefits to be gifts as is readily shown from the incentive income tax deduction provisions to employers for payments made into such plans. Moreover, the Second Circuit[5] recently rejected this so-called "employee-choice" rule in construing New York law,[6] and did indeed consider and evaluate issues of reasonableness of restraint of forfeiture for competitive employment, i.e., the legitimate interest of the employer to be protected. In the same case, the Second Circuit also held that employee restraints in these plans are not subject

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[3] *Smith* v. *Meyer.* 78 Misc.2d 711, 357 N.Y.S.2d 586 (Sup. Ct. N.Y. Co. 1973), *aff'd,* 44 App. Div.2d 778, 355 N.Y.S.2d 314 (1st Dept. 1974), *leave to appeal denied,* 34 N.Y.2d 517, 358 N.Y.S.2d 1026 (1974).

[4] *Inland Steel Company* v. *N.L.R.B.,* 170 F.2d 247, 253 (7th Circ. 1948), 12 A.L.R. 2d 240, *cert. den.,* 336 U.S. 960, 69 S. Ct. 887, 93 L.Ed. 1112 (1949).

[5] *Bradford* v. *The New York Times,* 501 F.2d 51 (C.A., 2d Cir. 1974).

[6] *Kristt* v. *Whelan,* 4 App. Div. 2nd 195, 164 N.Y.S. 2d 239 (1st Dept., 1957), aff'd without opinion, 5 N.Y. 2d 807, 181 N.Y.S. 2d 205 (1958).

to the anti-trust laws. Therefore, Respondents' argument (Page 7) to recast Petitioner's claim to be under the anti-trust laws is without basis.

The state decision cited by Respondent, and other state decisions,[7] premising forfeiture upon the ground that such benefits are gifts directly violates federal decisional law and the intent of Congress, above stated, and the confusion resulting from varying state decisions allowing recovery[8] clearly shows the need for a uniform national rule governing forfeiture for competitive employment in these plans, particularly where, as here, one plan effects thousands of employees engaged in interstate commerce and its subject matter is entirely derived from federal roots and sources.

Dated: New York, New York, November 26, 1975.

Respectfully submitted,

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[7] 41 A.L.R. 2d 15; 43 A.L.R. 2d 94.

[8] *Almers* v. *South Carolina National Bank of Charleston*, 217 S.E. 2d 135 (1975); *Lavey* v. *Edwards*, 264 Or. 331, 505 P.2d 342 (1973).